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In the
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-296

LAWRENCE S. HUFFMAN, As Prosecuting Attorney for Allen County, Ohio, and EDWARD FAIR, as sheriff of Allen County, Ohio,

Appellants

v.

PURSUE, LTD.,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

BRIEF FOR APPELLEE

QUESTIONS PRESENTED

1. Whether actions under the Civil Rights Act (Title 42 United States Code §1983) may be for claims other than racial discrimination; and if they may, whether the Appellee has properly pleaded such a claim?

2. Whether the principles of Younger v. Harris and Samuels v. Mackell apply

where the state action sought to be enjoined is civil in nature?

3. Whether the equitable doctrine of "unclean hands" forecloses a plaintiff seeking relief under Title 42 United States Code §1983, and thereby compels a federal district court from taking jurisdiction and granting relief?

4. Whether the First Amendment is to be used to protect the free speech rights of people rather than places?

5. Whether the constitutionality of the Ohio obscenity laws has any bearing on the constitutionality of the Ohio nuisance laws?

6. Whether the Ohio nuisance laws on their face and as applied violate the First Amendment to the Constitution of the United States because they impose a prior restraint on speech?

STATEMENT OF THE CASE

On September 18, 1972, at 1:06 p.m., Appellant Lawrence S. Huffman, as prosecuting attorney of Allen County, Ohio, filed a complaint in the Court of Common Pleas of Allen County, Ohio, entitled,

"State of Ohio ex rel Lawrence S. Huffman v. William H. Dakota, et al., Case No. 72 CIV 0326," seeking the abatement of the Cinema I Theatre located at 69 Public Square, Lima, Ohio, as a public nuisance. A copy of said complaint is reprinted in the Appendix at pages C3-14. Such action was commenced pursuant to Section 3767.03 of the Ohio Revised Code (see Appendix at page B-3). At the same time, Appellant Huffman filed his Motion for Temporary Injunction, a copy of which is reprinted in the Appendix at pages C15-17.

On September 20, 1972, Appellant Huffman filed an amended complaint in the Court of Common Pleas and thereafter copies of the Amended Complaint were served upon all of the persons previously served. A copy of the Amended Com-

plaint is reprinted in the Appendix at pages D3-10.

On September 26 and September 27, 1972, the Court of Common Pleas of Allen County, Ohio, convened a hearing on Appellant Huffman's Motion for Temporary Injunction in State of Ohio ex rel Huffman v. William H. Dakota, et al. At the conclusion of the presentation of evidence on September 27, 1972, the court ordered that the matter be continued to October 2, 1972, at which time additional evidence was presented by both the plaintiff and the defendants, after which the parties rested. On October 24, 1972, the Court of Common Pleas of Allen County, Ohio, granted the Temporary Injunction closing the theatre (App., pp.E3-5).

On October 26, 1972, William H.

Dakota, the Defendant in the state abatement action, Ohio ex rel Huffman v. William H. Dakota, et al., filed a civil rights complaint in the United States District Court, Northern District of Ohio, Western Division, entitled "William Dakota v. Edward Fair, Sheriff, and Joe Garlock, Deputy Sheriff, Civil Case No. 72-384," alleging a cause of action under Title 42 United States Code §1983, together with Motions for a Temporary Restraining Order, a Preliminary Injunction, and to convene a 3-judge panel. Dakota also filed a "Memorandum of Law on Effect of Removal on State Court Action" in the Allen County Common Pleas Court on the same date. A copy of said pleadings is reprinted in the Appendix at pages F3-27. Arguments on the Motion for Temporary Restraining Order were

heard on October 30, 1972, and the matter was taken under advisement.

Thereafter, United States Federal District Judge Nicholas J. Walinski, Northern District of Ohio, Western Division, ruled, in an opinion and order filed in said federal action on November 2, 1972, that the injunction of the state court, "has been overbroadly applied" and flew directly in the face of the United States Supreme Court decision in Near v. Minnesota, 283 U.S. 697 (1931), and ordered that the state court injunction be stayed "so far as it affects the showing of films which have not been held to be obscene in a prior adversary hearing." Judge Walinski further stated in his opinion that since the Ohio court may interpret the statute constitutionally upon a hearing for the permanent injunc-

tion, he would "reserve a ruling on the convening of a 3-judge panel under Title 28 United States Code §2284 until such time as the federal abstention doctrine is inapplicable." A copy of Judge Walinski's opinion and order is reprinted in the Appendix at pages G3-5.

On November 17, 1972, Appellee purchased the interest of William Dakota in Cinema I Theatre and obtained by assignment for valuable consideration all rights and duties of William Dakota as lessee of the premises of 69 Public Square, Lima, Ohio. The purchase and assignment of lease became effective on the same date, and Pursue, Ltd. commenced to operate the theatre.

On November 30, 1972, the Court of Common Pleas of Allen County, Ohio, the

Honorable Robert M. Light, Judge, heard testimony in the case of State of Ohio ex rel Huffman v. William Dakota, et al, No. 72 CIV 0326 upon the state's application for a permanent injunction against Defendants therein.

On November 30, 1972, at approximately 2:30 p.m., the Court issued an order of permanent injunction against Defendants thereby ordering the closing of Cinema I for one (1) year and ordering the property therein sold pursuant to Ohio law, Sections 3767.01 et seq. of the Ohio Revised Code (App. pp.I3-6). Within two (2) hours the theatre was padlocked and the keys of Plaintiff's employee were seized by law enforcement agents. (App. p.J9)

Notwithstanding Judge Walinski's opi-

nion and order entered November 2, 1972, in Dakota v. Fair, et al., No. C72-384 (App., pp.G3-5), the Honorable Robert M. Light failed to comply with the opinion as to the impermissibility of prior restraints upon free speech and press guaranteed by the First Amendment to the Constitution of the United States, and effectively enjoined the dissemination of any and all motion picture films, whether or not sexually oriented. (App., pp. I3-6)

On December 1, 1972, the Appellee filed an action in the United States District Court for the Northern District of Ohio, Western Division, entitled Pursue, Ltd. v. Lawrence S. Huffman, in his capacity as Prosecutor of Allen County, Ohio, and Edward Fair, in his capacity as Sheriff of Allen County,

Ohio, CIV 72-432, alleging a Civil Rights cause of action under Title 42 United States Code §1983, together with motions for a temporary restraining order, preliminary and final injunction and application for a 3-judge court. A copy of said complaint is reprinted in the Appendix at pages J3-18.

On December 1, 1972, the same date that the federal action was filed, United States District Court Judge Nicholas J. Walinski entered an order "to prevent great and irreparable harm to the plaintiff, prior to the convening of a 3-judge court in this matter, pursuant to 28 U.S.C. §2248" which ordered the judgment of the Allen County Common Pleas Court in State ex rel Huffman v. William H. Dakota, et al., 72 CIV 0326, dated November 30, 1972, stayed except

"insofar as any order which may apply to films that have previously been declared obscene in a prior adversary hearing". A copy of said order is reprinted in the Appendix at page J-19.

On December 11, 1972, the Sixth Circuit Court of Appeals designated Circuit Judge Anthony J. Celebrezze, District Court Judges Nicholas J. Walinski and Don J. Young as members of the three-judge District Court in Pursue, Ltd. v. Huffman, et al., 72 Civ. 432. On December 21, 1972, said three-judge District Court ordered all parties to file briefs in the matter on or before January 15, 1973. Copies of such orders are reprinted in Appendix at pages L22-25.

On December 29, 1972, Pursue, Ltd. filed amendments to its complaint in

Pursue, Ltd. v. Huffman, et al., 72 Civ. 432, and on January 5, 1973, Appellants filed their answers thereto. A copy of said amendments and answers is reprinted in the Appendix at pages M4-14.

On February 12, 1973, Appellants herein filed three motions in Pursue, Ltd. v. Huffman, 72 Civ. 432, namely: 1. A Motion to Dismiss; 2. A Motion to Dissolve the Temporary Restraining Order; and 3. A Motion for Immediate Hearing. Copies of said motions and the supporting memoranda are reprinted in the Appendix at pages 03-16.

The three-judge Federal District Court heard oral arguments on the temporary restraining order in Pursue, Ltd. v. Huffman, et al., 72 Civ. 432, on March 12, 1973. A copy of the transcript of

the March 12 proceedings (hereinafter referred to by the designation "T") has been lodged with the Clerk of this Court as Exhibit 1 to the Petition for a Writ of Mandate or Prohibition, in Huffman, et al v. United States District Court for the Northern District of Ohio, Western Division, No. 72-1613, on file with this Court.

On April 20, 1973, the court issued its opinion and order holding the closure portions of the Ohio Nuisance Statute, Sections 3767.04 and 3767.06, unconstitutional and enjoined the Appellants herein from executing that portion of the Allen County Common Pleas Court judgment of November 30, 1972, in State of Ohio ex rel Huffman v. William H. Dakota, et al., 72 CIV 0326, which ordered the closing of the Cinema I Theatre at 69 Public

Square, Lima, Ohio, "for a period of one year unless sooner released by order of Court pursuant to the defendant-owners fulfilling the requirements provided in Section 3767.04 of the Revised Code of Ohio ..." (see Appendix at pages A3-12).

A notice of appeal was filed in the United States Supreme Court on May 14, 1973.

On June 1, 1973, Appellants petitioned this Court for a Writ of Mandate or Prohibition in Huffman et al v. United States District Court for the Northern District of Ohio, Western Division, et al, No. 72-1613, and also made application to Justice Potter Stewart for a stay order or writ of injunction, and an order to advance the date set for filing of briefs in opposition to the petition. On June

25, 1973, both matters were referred to and denied by the Court as a whole. Huffman et al v. United States District Court for the Northern District of Ohio, et al., 413 U.S. 918 (June 25, 1973).

The Jurisdictional Statement was filed on August 14, 1973.

SUMMARY OF ARGUMENT

This Court has long held that where a citizen's constitutional rights are violated under color of state law he may bring an action seeking relief therefrom under Title 42 United States Code §1983, and that the violations he seeks relief from need not be those based on racial discrimination. Therefore, as Appellee asserts that its First Amendment rights are being violated by the Appellants under color of state law, it has properly

asserted a claim falling within the ambit of Title 42 United States Code §1983. See Mitchum v. Foster, 407 U.S. 225 (1972).

The Appellee argues further that the principles enunciated in Younger v. Harris, 401 U.S. 37 (1971), and Samuels v. Mackell, 401 U.S. 66 (1971) do not apply to its request for federal intervention and equitable relief. The reasons for this are that those cases apply to situations wherein there are pending state criminal prosecutions, and in this case, the actions that the Appellee claims are wholly contrary to the First Amendment are civil in nature. The state in this case has chosen to prevent the Appellee from exercising freedom of speech through the use of nuisance abatement actions. This Court has recognized that there are different considerations

involved when the actions complained of are civil rather than criminal. See Steffel v. Thompson, ___ U.S. ___, 39 L. Ed.2d 505 (March 19, 1974); Mitchum v. Foster, 407 U.S. 225 (1971); Speight v. Slaton, ___ U.S. ___, 39 L.Ed.2d 367 (February 27, 1974) (per curiam); Lake Carriers Assn. v. MacMullan, 406 U.S. 498 (1972).

Even if, arguendo, Younger v. Harris principles were to apply in the instant case, Appellee argues that its' case nevertheless is a proper one for federal intervention and equitable relief. Enforcement by the state of its permanent injunction against the operation of Cinema I Theatre would be of great, immediate, and irreparable injury to the Appellee. First Amendment rights, paramount among constitutional rights, are

in dire jeopardy. No relief is available to the Appellee in the state courts of Ohio, and the Appellee is forced to forego protected rights in order to avoid continued harassment and prosecution. See, e.g., Steffel v. Thompson, ___ U.S. ___, 39 L.Ed.2d 505; Dombroski v. Pfister, 380 U.S. 479; Kusper v. Pontikes, 411 U. S. 915; Gibson v. Berryhill, 411 U.S. 564; Near v. Minnesota, 283 U.S. 687.

Appellee cannot be prevented from seeking equitable relief when its First Amendment rights are thus endangered and violated because of the misapplication of the equitable doctrine that a party seeking equity must do equity. What Appellants claim is that the Appellee is foreclosed from being granted relief because of a past transgression of the law. Such an argument is absurd and clearly contra-

venes the express holding of this Court in Near v. Minnesota, 283 U.S. 687. Appellants are saying, in effect, that "We'll achieve a prior restraint, one way or the other." Such a contention cannot be countenanced.

Appellant's argument that the land is being restrained, not people, also misses the mark. The First Amendment secures freedom of speech to persons not places. When a place is "restrained", the truth becomes evident that the free speech of persons is what is actually being restrained. The style or nature of the action cannot be allowed to be a device to proscribe free speech where a more obvious and direct proscription would not be tolerated. See, e.g., Bates v. City of Little Rock, 361 U.S. 516 (1960).

Appellants have appealed from a finding of unconstitutionality of the Ohio Nuisance Statutes, having prevailed on the question of the constitutionality of the definition of obscenity contained in Ohio Revised Code §3767.01. The latter question, therefore, is not before this Court. What is before this Court is the use of Ohio Revised Code §3767.04 and §3767.06 as a prior restraint on free speech.

The statutes permit, and have been and are being used for, the closing of a theatre for one (1) year upon the showing that any one film exhibited is obscene. No prior adversary hearings to determine obscenity are provided, and the statutes shift the burden to the operator of the theatre to show the non-obscenity of any film he may wish to exhibit in the future.

This is the essence of censorship, self-censorship, and prior restraint. See Near v. Minnesota, 283 U.S. 687; Freedman v. Maryland, 380 U.S. 51; Smith v. California, 361 U.S. 147.

ARGUMENT

I.

THE APPELLEE HAS STATED A CAUSE OF ACTION PROPERLY INVOKING FEDERAL COURT JURISDICTION

A. TITLE 42 U.S.C. §1983 and §1985 CLEARLY PROTECT AGAINST INCURSIONS OF CONSTITUTIONAL RIGHTS OTHER THAN RACIAL DISCRIMINATION.

There is not the slightest doubt that this Court has consistently held that 42 U.S.C. §1983 and §1985 go well beyond racial discrimination in the protection of the rights of the citizens of the United States. See Mitchum v. Foster, 407 U.S. 225 (1971); Younger v. Harris,

401 U.S. 37 (1971) [and its companion cases]; Dombroski v. Pfister, 380 U.S. 479 (1965); Douglas v. City of Jeanette, 319 U.S. 157 (1943). Any doubt that could possibly be raised as to the applicability of these statutes was put to rest by this Court in Mitchum v. Foster, supra, wherein in recounting the history and purpose of 42 U.S.C. §1983, this Court said:

> Section 1983 opened the Federal Courts to private citizens offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation.[30]
>
> [30]As Representative Shellabarger stated, the Civil Rights Act of 1871 "not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to people where, under color of State law, they or any of them may be deprived of rights to which they are

> entitled under the Constitution by reason and virtue of their national citizenship." Cong. Globe, 42d Cong. 1st Sess., App., 68 (1971).

407 U.S. at 239. Thus, the Appellee herein has stated a cause of action within the well-defined parameters of 42 U.S.C. §1983 and §1985.

B. APPELLEE HAS ALLEGED FACTS IN ITS COMPLAINT BELOW STATING A CAUSE OF ACTION UNDER TITLE 42 U.S.C. §1983.

The factual allegations of the Appellee included an adoption by reference of the factual allegations contained in the Complaint filed in Dakota v. Fair, Docket No. C72-384 (Appendix, pp.F3-9), a predecessor and related case to the instant action. Appellee's Complaint (Appendix, pp.J3-18) states that the Appellee (Plaintiff therein) succeeded Dakota in interest to the theatre in question

twenty-two (22) days after the filing of Dakota's Complaint. The latter Complaint alleged the bringing of an action against the Plaintiff (Dakota) for a temporary injunction, the scheduling of a hearing for a permanent injunction, Plaintiff's lack of an adequate remedy at law, the padlocking of his theatre, a judicial determination of non-obscenity of the films in question, and the deprivation of his rights secured to him by federal law and the United States Constitution due to the acts of the Defendants therein under color of state law. Appellee has included all of these allegations by reference and has further alleged that it succeeded Dakota in interest to the theatre in question, that it is being deprived of its rights secured it by the United States Constitution, that an in-

junction against Appellee closing the theatre had been entered, the theatre actually seized and closed, the failure of the state courts to abide by Judge Walinski's order in Dakota v. Fair (Appendix pp. G3-5), and that the action constituted an impermissible prior restraint contrary to the United States Constitution, and that the Appellants (Defendants therein) have established a pattern of conduct seeking to deprive Appellee of its rights secured to it by the United States Constitution.

This Court in Scheuer v. Rhodes, ___ U.S. ___, 40 L.Ed.2d 90 (April 17, 1974), quoted from Conley v. Gibson, 355 U.S. 41 (1957) wherein this Court said, "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dis-

missed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. at 45-46. As the Court in Scheuer v. Rhodes, supra, said, "... the allegations of the complaint should be construed favorably to the pleader." 40 L.Ed. at 96. Thus, the allegations contained in the complaint herein clearly state a cause of action for which Appellee is entitled to relief.

II.

THE THREE JUDGE FEDERAL DISTRICT COURT WAS PROPERLY CONVENED, AND PROPERLY TOOK JURISDICTION OF THE CASE BELOW BECAUSE THE RESTRICTIVE PRINCIPLES OF YOUNGER V. HARRIS WERE INAPPLICABLE TO THE STATE PROCEEDING HEREIN BECAUSE IT WAS (1) COMPLETED EXCEPT FOR FUTILE REVIEW IN THE STATE APPELLATE COURTS, AND (2) THE ACTION BELOW WAS CIVIL RATHER THAN CRIMINAL IN NATURE.

Younger v. Harris, 401 U.S. 37, and Samuels v. Mackell, 401 U.S. 66, both set standards for federal equitable relief in pending state criminal prosecutions. Whatever showing Younger v. Harris may require for federal intervention in state court proceedings, those requirements are clearly inapplicable to the proceedings herein. Mr. Justice Black wrote in Younger that "we express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun." 401 U.S. at 41. In the concurring opinion of Mr. Justice Stewart, he stated that "since all these cases involve state criminal prosecutions, we do not deal with the considerations which should govern a federal court when it is asked to inter-

vene in state civil proceedings, where, for various reasons, the balance might be struck differently." 401 U.S. at 55.

In the instant action, there are no pending criminal prosecutions against the Appellee. Rather Appellee is challenging the use of a civil nuisance abatement action which has already come to completion except for enforcement an injunction against its operation of a theatre. This Court on numerous occasions has recognized the fact that pending civil actions in the state may entail different considerations than where there are pending state criminal prosecutions involved. In Mitchum v. Foster, 407 US. 225, this Court said:

> In short, if a Section 1983 action is not an "expressly authorized" statutory exception, the anti-injunction law absolutely prohibits in

> such an action all federal equitable intervention in the pending state court proceeding, whether civil or criminal, and regardless of how extraordinary the particular circumstances may be.

407 U.S. at 229 (emphasis added).

> Secondly, if Section 1983 is not within the "expressly authorized" exception of the anti-injunction statute, then we must overrule Younger and its companion cases insofar as they recognize the permissibility of injunctive relief against pending criminal prosecutions in certain limited and exceptional circumstances. For, under the doctrine of Atlantic Coastline, the anti-injunction statute would, in a Section 1983 case, then be an "absolute prohibition" against federal equity intervention in the pending state criminal or civil proceeding - under any circumstances whatever.

407 U.S. at 231 (emphasis in original).

This Court was faced with the question of pending state civil proceedings under state nuisance statutes in Speight v. Slaton, ___ U.S. ___, 39 L.Ed.2d 367, but did not have an opportunity to decide the case on its merits. Speight was mooted due to a decision by the Georgia Supreme Court in Sanders v. State, No. 28352, January 28, 1974, ___ Ga. ___, ___ S.E.2d ___, wherein that Court, in the words of this Court, held "that this application of Section 26-2103 'represents an unconstituional prior restraint when construed and applied to authorize the permanent closure of the book store as a public nuisance upon a finding that a single publication, obscene under the standards of Code Ann. §26-2101(b), was sold on the premises.'" ___ U.S. ___, 39 L.Ed.2d at 368. This Court went on to

say in Speight, supra, that:

> It would appear that this Georgia Supreme Court Decision would probably foreclose the state action against which federal injunctive relief was sought by Appellants in this case. In that event, Appellants could obtain full relief in the state court proceedings merely by moving to dismiss the state action, in accordance with state procedural rules, in light of Sanders v. State of Georgia. If that is the case, Appellants could not now make any showing of irreparable injury by reason of the state court proceeding, and such a showing is, of course, required before the federal court could grant equitable relief, apart from any special considerations involved in Younger v. Harris, 401 U.S. 37, 46, 27 L.Ed.2d 669, 91 S.Ct. 746.
>
> We therefore vacate the judgment below and remand to the District Court for reconsideration in light of the decision of the Georgia Supreme Court in Sanders v. State of Georgia, supra.

___ U.S. ___, 39 L.Ed. at 369.

The closest this Court has come to deciding the propriety of federal intervention where there are no pending state prosecutions was in Steffel v. Thompson, ___ U.S. ___, 39 L.Ed.2d 505 (March 19, 1974). This Court said in Steffel that the reservations expressed in Younger v. Harris and Samuel v. Mackell regarding the propriety of federal intervention in the absence of a pending state prosecution, "anticipated the Court's recognition of the relevant principles of equity, comity, and federalism 'have little force in the absence of a pending state proceeding.' Lake Carriers' Assn. v. MacMullan, 406 U.S. 498, 509, 39 L.Ed.2d 257, 92 S. Ct. 1749 (1972). When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the

state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state courts' ability to enforce constitutional principles." ___ U.S. ___, 39 L.Ed.2d at 516.

Steffel differs from this case in several manners. One is that both injunctive and declaratory relief are being sought here where only declaratory relief was in question in Steffel. Two, this case concerns the constitutionality of the statutes in question both on their face and as applied. And three, Steffel concerned threatened state prosecutions where this case concerns both the absence of criminal prosecutions both pending or threatened[1] and concern a state

[1] There is no "threat here per se, but a threat of criminal prosecutions against

civil action which is no longer pending save for the execution of the injunction granted in the state court.

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1 cont'd.

the Appellee exists in that Appellee must adhere to an unconstitutional prior restraint in order not to contravene the criminal laws of Ohio. Further, Appellants have set a pattern of nuisance abatement actions, thereby effectively "threatening" Appellee with further actions should it continue to show films at any theatre that the authorities personally find offensive. As this Court has said before, sex and obscenity are not synonymous. Kois v. Wisconsin, 408 U.S. 229; Roth v. United States, 354 U.S. 476. Thus, this case is markedly different from cases where future injury would be entirely speculative.

> Here we can only speculate whether respondents will be arrested either again or for the first time, for violating a municipal ordinance or a state statute, particularly in the absence of any allegations that unconstitutional criminal statutes are being employed to deter constitutionally protected conduct.

O'Shea v. Littleton, ___ U.S. ___, 38 L. Ed.2d 674, 684 (Jan. 15, 1974). See

Even assuming, arguendo, that the requirements of Younger v. Harris and Samuels v. Mackell were to be applied where a civil action is in question rather than a criminal action, the case herein would meet those requirements. Contrary to Appellants arguments, a showing of great and immediate irreparable injury is sufficient by itself to permit federal intervention. When a great and immediate deprivation of First Amendment rights is shown in conjunction with the complete and utter absence of any remedy available in the state courts, then, equitable intervention is mandated by Younger v. Harris. And this position

1 Cont'd.

Steffel v. Thompson, ___ U.S. ___, 39 L. Ed.2d 505, 517 n.12 (Mar. 19, 1974); Golden v. Zwickler, 394 U.S. 103 (1959).

is even stronger when it is considered that we are talking not about the state criminal prosecutions, but about a civil action which is no longer pending but has actually begun to deprive the Appellee herein of its First Amendment rights as granted it by the United States Constitution. As the Court in Steffel said:

> Requiring the federal courts totally to step aside when no state criminal prosecution is pending against the federal plaintiff would turn federalism on its head. When federal claims are premised on 42 U.S.C. §1983 [42 U.S.C.S. §1983] and 28 U.S.C. §1343(3) [28 U.S.C.S. §1343(3)] -- as they are here -- we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights. See, e.g., McNeese v. Board of Education, 373 U.S. 668, 10 L.Ed.2d 622, 83 S.Ct. 1433 (1963); Monroe v. Pape, 365 U.S. 167, 5 L.Ed.2d 492, 81 S.Ct. 473 (1961). But exhaustion of state remedies is

> precisely what would be required if both federal injunctive and declaratory relief were unavailable in a case where no state prosecution had been commenced.

___ U.S. ___, 39 L.Ed.2d at 522.

Appellants argue that the Appellee here has not exhausted its state remedies. However, to do so would be an exercise of futility. The Ohio Courts have recently upheld the propriety of using a nuisance statute for a prior restraint of allegedly obscene motion pictures. In State ex rel Ewing v. A Motion Picture Film Entitled, "WITHOUT A STITCH", 37 Ohio State 2d 95 (1974), the Ohio Supreme Court said: "This Court holds that R.C. 3767.01 et seq. are applicable in cases involving exhibition of a single motion picture film." 37 Ohio State 2d at 98. Where a decision of the state's highest Court precludes

reversal on appeal then exhaustion of remedies is not required. See Kusper v. Pontikes, 411 U.S. 915 (1973).

The Appellee has shown that it has suffered and is continuing to suffer great and immediate irreparable injury to First Amendment rights secured it by the United States Constitution. The Ohio statutes in question both on their face and as applied clearly constitute a major prior restraint of free speech. If the state injunction is allowed to be executed against the Appellee then the theatre will be closed for one (1) year regardless of what films may or may not be shown in the future and without a prior adversary hearing regarding the alleged "obscenity" of any particular film. The Ohio statutes place a burden on the Appellee, therefore, to show in

advance that they are acting in a constitutionally protected area rather than having the burden on the State to show films are obscene by law before enjoining the showing of a particular film itself. Thus, the Appellee will be forced to act as censor of its own activity.

> There is some question, however, whether a showing of irreparable injury might be made in a case where, although no prosecution is pending or impending, an individual demonstrates that he will be required to forego constitutionally protected activity in order to avoid arrest. Compare Dombroski v. Pfister, 380 U.S. 479, 14 L.Ed.2d 22, 85 S.Ct. 1116 (1965); Hygrade Provision Co., Inc. v. Sherman, 266 U.S. 497, 69 L.Ed. 402, 45 S.Ct. 141 (1925); and Terrace v. Thompson, 263 U.S. 197, 214, 216, 68 L.Ed. 255, 44 S.Ct. 15 (1923), with Douglas v. City of Jeanette, 319 U.S. 157, 87 L.Ed. 1324, 63 S. Ct. 877 (1943); see generally Note, Implications of the Younger Cases for the

Availability of Federal Equitable Relief When No State Prosecution is Pending, 72 Col L Rev 874 (1972).

Steffel v. Thompson, ___ U.S. ___, 39 L. Ed. 2d 505, 517, n.12.

So, in addition to having (1) a civil rather than a criminal proceeding, (2) a "non-pending" rather than a pending proceeding, (3) a showing of great and immediate irreparable injury, and (4) the lack of adequate (indeed any) relief in the state courts, we also show a complete lack of collateral relief procedures (e.g., habeas corpus) as such relief would be available in criminal prosecutions. Younger v. Harris, supra, rests primarily on a principle of comity and federalism permitting a state court to proceed to final adjudication on the belief that state courts will protect federal rights as well as a federal court

may. However, where it is shown, see Kusper v. Pontikes, supra, that no such relief would be available in the state court, as is the case here, where the injury is great, and where no collateral relief such as habeas corpus is available, then the principles requiring non-intervention in Younger clearly cannot apply in the case here. As the Court in Steffel said:

> In addition, while a pending state prosecution provides the federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding. Cf. Dombroski v. Pfister, 380 U.S. 479, 490, 14 L.Ed.2d 22, 85 S.Ct. 1116 (1965)

___ U.S. ___, 39 L.Ed.2d at 516.

It is clear, then, that this Court has been developing a theory of law that would necessitate equitable federal intervention in cases such as this where there is no pending criminal proceeding, where there is no adequate remedy at law in the state courts, and where there is a clear showing of great and immediate irreparable injury. As Mr. Justice Brennan said in Lake Carriers' Assn. v. MacMullan, 406 U.S. 498 (1972):

> In Younger v. Harris, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971), and Samuels v. Mackell, 401 U.S. 66, 27 L.Ed.2d 688, 91 S.Ct. 764 (1971), this Court held that, apart from "extraordinary circumstances," a federal court may not enjoin a pending state prosecution or declare invalid the statute under which the prosecution was brought. The decisions there were premised on considerations of equity practice and comity in our federal system that have little force in

> the absence of a pending state proceeding. In that circumstance, exercise of federal court jurisdiction is appropriate if the conditions for declaratory or injunctive relief are met. See generally Perez v. Ledesma, 401 U.S. 82, 93, 27 L.Ed.2d 701, 710, 91 S.Ct. 674 (1971) (Separate opinion).

406 U.S. at 509-510 (emphasis added). Likewise this Court's opinion in Gibson v. Berryhill, 411 U.S. 564 (1973), also dictates that equitable intervention was appropriate in this case because therein this Court held unanimously that a predicate for a Younger v. Harris dismissal is the opportunity to raise and have timely decided by a competent state tribunal the federal issue involved. As is shown above, such opportunity is completely unavailable in this case.

Thus, in order to prevent the consti-

tutionally impermissible prior restraint involved in this case which constitutes a great and immediate injury to the Appellee, and to obviate the necessity of self-censorship (which the state courts and statutes of Ohio necessarily demand) a federal court must proceed to intervene in this case. Comity and federalism cannot be offended where there is no state prosecution pending and where state procedures will not be upset. This is especially true when First Amendment rights are involved. So given the state's already clear and stated position on the statutes and given the position that the Appellee finds itself in, then intervention is absolutely necessary in order to effectuate the protection of the Appellee's First Amendment rights. See, Freedman v. Maryland, 380 U.S. 51; Blount

v. Rizzi, 400 U.S. 410; Kingsley Books, Inc. v. Brown, 354 U.S. 436; Dombroski v. Pfister, 380 U.S. 479; Near v. Minnesota, 283 U.S. 687.

III.

THE EQUITABLE DOCTRINE OF "UNCLEAN HANDS" IS INAPPLICABLE TO A CIVIL RIGHTS ACTION WHERE A SERIOUS CONSTITUTIONAL CLAIM OF FIRST AMENDMENT VIOLATIONS IS RAISED, COMPLAINTS OF NEAR V. MINNESOTA VIOLATIONS ARE MADE, & A THREE JUDGE DISTRICT COURT WAS PROPERLY CONVENED.

Appellants in their argument seek to deprive the Appellee of First Amendment freedoms by the doctrine of "unclean hands" as surely as they would deprive Appellee of its First Amendment freedoms by a Near v. Minnesota prior restraint. Whether a person or corporation has been "guilty" at one time in the past of showing an obscene film as adjudicated by a court has no relation whatsoever to

whether future activities can be proscribed in advance. The question in this case is whether or not a person can be deprived of First Amendment freedoms for one (1) year upon the basis of the showing of one (1) film. The equitable doctrine Appellants raised goes to the heart of the merits of this case itself. The Appellee claims that its rights have been violated and are continuing to be violated by the closing of the theatre for a year based upon the showing of one film deemed to be "obscene". If this, then, is the question at issue in this case, Appellants would foreclose its being raised and adjudicated on the merits by stating that because the Appellee (or its predecessor in interest) once engaged in this activity, it can no longer come to court because its hands are "unclean".

What may not be accomplished one way in the law surely should not be allowed to be accomplished another way, a way which at the least is subverting and frivolous in nature. See, e.g., Bantam Books v. Sullivan, 372 U.S. 58 (1963); Blount v. Rizzi, 400 U.S. 410 (1971); Carroll v. Comm'rs. of Princess Anne, 393 U.S. 175 (1968); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971).

IV.

THE FIRST AMENDMENT PROTECTS PEOPLE NOT PLACES AND IT CANNOT BE UNDERMINED BY STYLING THE ACTION AS ONE AGAINST "THE LAND" RATHER THAN AGAINST THE INDIVIDUAL.

The Appellants seek to foreclose review of this case by claiming that the state court action was an in rem action rather than an in personam action. Such a result would be a complete negation of the reality of the situation in the case

below. What an action may be titled is not in issue here. Rather, the concern is with its actual effect. What has occured in the state courts of Ohio is a blatant restriction of First Amendment freedom of expression and speech. It cannot be reasonably controverted that the First Amendment secures freedom of speech to persons and not to places. See, e.g., United States v. Caldwell, 408 U.S. 665; Curtis Publishing Company v. Butts, 388 U.S. 130; Griswold v. Connecticut, 381 U.S. 479; Schneider v. Smith, 390 U.S. 17.

Though the action in the state courts is, in one sense, technically speaking, an action against the property, it is also an action against the parties. (See the style of the action in the state courts in the Appendix at Page C-3).

What is being restrained and what is being affected most of all is not the property per se, but those using property: owners, lessees, and patrons. Under the Ohio nuisance statutes (O.R.C. §3767.04 and §3767.06), only the parties as individuals could relieve the burden of the state injunction against the property. Only they could come to court with the heavy burden of showing the non-obscenity of future materials to abate the nuisance. The property itself could not do this.

It is clear that the First Amendment has a preferred position in the heirarchy of constitutional rights and protections, see Follett v. Town of McCormack, 321 U.S. 573, Thomas V. Collins, 323 U.S. 516, and is a fundamental right accorded persons, see United States v. Caldwell, 408 U.S. 665, Griswold v. Connecticut,

381 U.S. 479, Chaplinsky v. New Hampshire, 315 U.S. 568. Any regulation of speech must be with the highest degree of precision or else First Amendment freedoms will suffer grievous harm, see Blount v. Rizzi, 400 U.S. 410, Keyishian v. Board of Regents, 385 U.S. 559. First Amendment rights are to be protected from subtle interference as well as from a more frontal attack. Bates v. City of Little Rock, 361 U.S. 576. Thus, the Appellants herein should not be permitted to subvert the First Amendment by focusing attention on the style of an action rather than upon its obvious and practical effect.

V.

THE CONSTITUTIONAL STATUS OF THE OHIO OBSCENITY STATUTE O.R.C. §3767.01 IS NOT IN ISSUE HEREIN, AND A DETERMINATION OF ITS

STATUS IN NO WAY AFFECTS THE UNCONSTITUTIONALITY OF THE OHIO NUISANCE STATUTES §3767.04 AND §3767.06 WHICH ARE IN ISSUE HEREIN[2]

Appellants have made a lengthy argument to the effect that the Ohio obscenity statutes within the nuisance statutes are constitutional and fully comport with this Court's opinion in Miller v. California, 413 U.S. 15. Assuming, arguendo, that obscene films have been shown at the theatre which is the subject of this case, and that the Ohio obscenity law is valid under the test of Miller v. Calif-

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[2] Also not in issue in this case is the removal action in Dakota v. Ohio ex rel. Lawrence S. Huffman, C72-445 (Appendix pp.S-1-3). First, that action was dismissed by Judge Walinski, sua sponte, as moot because of the district court's opinion in Pursue, Ltd. v. Huffman, No. C72-432, which was dated six (6) days prior to Judge Walinski's Order. Secondly, the action appealed from is that of the three-judge district court in Pursue,

ornia, supra, and Hamling v. United States, ___ U.S. ___, 41 L.Ed.2d 590 (June 24, 1974), the issue here still remains whether or not the theatre can be closed for the period of one (1) year and the showing of any motion picture forbidden consistent with Near v. Minnesota, 2 283 U.S. 697.

Assuming, arguendo, that a particular film may be deemed obscene after a proper judicial hearing on the merits and under a statute that meets the requirements of Miller v. California, supra, that would still not obviate the necessity of examining whether such a finding

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2 (cont'd) Ltd. v. Huffman, not the removal action in Dakota v. Ohio ex rel. Huffman. Thus, the removal action is not before this Court.

could be used as the basis for the prevention of the showing of any film in the future, such films not having a judicial determination of obscenity under the requirements of Miller v. California, supra.

Thus, the Appellants' argument concerning the constitutionality of Ohio's definition of obscenity in the Nuisance statutes raises two (2) problems. First, even if this statute was the clearest and most precise example of proper statutory regulation of obscenity, per Miller v. California, supra, that would still not reach the question of the propriety of the Ohio Nuisance Statutes O.R.C. §3767.04 and §3767.06. Second, the opinion and order from which Appellants' appeal concerns not the obscenity provisions of the Nuisance Statutes (O.R.C. §3767.01) but

rather the Ohio Nuisance Statutues (O.R. C. §3767.04 and §3767.06). Thus the question is not even at issue and is not before this Court.

VI.

THE OHIO NUISANCE STATUTES O.R.C. §3767.04 and §3767.06, AS WRITTEN AND AS APPLIED, CONSTITUTE AN IMPERMISSIBLE PRIOR RESTRAINT OF FREE SPEECH AND ARE THUS UNCONSTITUTIONAL UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AND THE DOCTRINE ENUNCIATED BY THIS COURT IN NEAR V. MINNESOTA, 283 U.S. 697

The Ohio Nuisance Abatement Statutes (O.R.C. §3767.04 and §3767.06) provide for, and have been used for, the closing of a theatre for a period of one (1) year upon the showing of the obscenity of a single motion picture film that had previously been exhibited. The statutes submit the operator of the theatre to

the burden of coming forth to the courts of Ohio and giving bond and showing evidence, satisfactory to the courts, that any film he might show in the future will not be obscene. Thus, upon the showing of one alleged transgression of the law a theatre may be closed for future speculative transgressions of the law. This Court has, on numerous occasions, held that prior restraints in the area of First Amendment rights comes to the Court with a heavy presumption of unconstitutionality. See Heller v. New York, 413 U.S. 483; Organization for a Better Austin v. Keefe, 402 U.S. 415; Freedman v. Maryland, 380 U.S. 51; United States v. Washington Post Company, 403 U.S. 713; Burstyn, Inc. v. Wilson, 343 U.S. 495; Kingsley Books, Inc. v. Brown, 354 U.S. 436; Chaplinsky v. New Hampshire, 315

U.S. 568; Carroll v. Commissioners of Princess Anne, 393 U.S. 175.

As the Court in Near v. Minnesota, 283 U.S. 697, said:

> In attempted justification of the statute, it is said that it deals not with publication per se, but with the "business" of publishing defemation. If, however, the publisher has a constitutional right to publish, without previous restraint, an edition of his newspaper charging official derelictions, it cannot be denied that he may publish subsequent editions for the same purpose. He does not lose his right by exercising it. If his right exists, it may be exercised in publishing nine editions, as in this case, as well as in one edition. If previous restraint is permissible, it may be imposed at once; indeed, the wrong may be as serious in one publication as in several. Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitu-

> tional immunity against restraint. Similarly, it does not matter that the newspaper or periodical is found to be "largely" or "chiefly" devoted to the publication of such derelictions. If the publisher has a right, without previous restraint, to publish them, his right cannot be deemed to be dependent upon his publishing something else, more or less, with the matter to which objection is made.

283 U.S. at 720.

Thus, the Appellee is forbidden by the Ohio laws to show any film in the future because one film in the past was deemed to be "obscene". No adequate safeguards in the form of a prior adversary hearing is afforded to the Appellee in such an action. All further activity of the theatre is deemed automatically to be a nuisance unless the theatre operator can come forward and show that what he intends to

show in the future will not be obscene. This he has to do without the benefit of an adequate adversary hearing to determine obscenity, and it constitutes an impermissible shifting of the burden to the individual to show the non-obscenity of a particular film rather than being properly on the state to show the obscenity of a film. As the three judge district court said below:

> Unlike the Grove Press case, the present suit does not challenge the Ohio nuisance statute as applied to a single motion picture which has been adjudged obscene in a prior adversary hearing. Rather, we are here faced with an injunction under that statute which bars the showing of any films and closes the theatre "for any purpose" for a period of one year. Although a prior adversary hearing was conducted with respect to some 16 films in the theatre's possession prior to the state court's final judgment, the statute provides for no such hearing on any other films which the operator

may have intended to show during the one-year period.

No less than the injunctive penalties imposed under the state nuisance statute in Near v. Minnesota, supra, the Common Pleas Court's order closing the theatre for one year constitutes an impermissible prior restraint in that no adequate safeguards -- in the form of prior adversary hearings -- are afforded for materials which might be non-obscene and thus protected by the First Amendment. See Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 65-66 (1963). Compare Kingsley Books, Inc. v. Brown, 354 U.S. 436, 445 (1957). The invalidity of this procedure is not removed by the fact that under the statute Plaintiff can obtain a release from the court's order by satisfying the court that the nuisance has been abated. Such a procedure which places upon the individual or corporation the burden of proving that matter which he intends to distribute or exhibit is protected by the First Amendment is "but a step [toward] a complete system of censorship." Near v. Minnesota, supra, 283 U.S. at 721.

(Appendix, pp. A10-11).

The result of such statutes is that one is forced to become a self-censor of material in order to remain in business. Such self-censorship has been on numerous occasions severely scorned by this Court. See Carroll v. Comm'rs of Princess Anne, 393 U.S. 175; Freedman v. Maryland, 380 U.S. 51; Smith v. California, 361 U.S. 147; Kingsley Books, Inc. v. Brown, 354 U.S. 436. Again, as this Court said in the touchstone case of Near v. Minnesota, supra:

> If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandelous and defamatory matter -- in particular that the matter consists of charges against public officers of official dereliction -- and unless the owner or publisher

> is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship.

283 U.S. at 713 (emphasis added).

Under such a state of affairs, protected as well as unprotected material is proscribed and the individual is forced to become a self-censor. Whatever legitimate interests the state may have, that interest can clearly be served by the use of its criminal statutes for the prosecution of violations of the obscenity laws. Instead, the State seeks not to punish the Appellee for what it may have done, but to punish it for what the State believes it may do in the future. Thus, the serious chilling effect warned of in

Dombroski v. Pfister, 380 U.S. 479, is thrust upon the Appellee as well as all others subject to the statutes. Even when we are not talking about prior restraint, regulation of First Amendment freedoms must be carefully drawn so as not to draw within their scope protected activity. Precision of regulation, it has been said, is a touchstone here, see Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676; Keyishian v. Board of Regents, 385 U.S. 559; Speiser v. Randall, 357 U.S. 513; Blount v. Rizzi, 400 U.S. 410. When such an overbroad statute is used, not only to proscribe current activity, but to proscribe future speculative activity, i.e., prior restraint, then the statutes in question clearly offend all constitutional principles. See Kingsley Books, Inc. v. Brown, 354 U.S.

436; Chaplinsky v. New Hampshire, 315 U.S. 568; Burstyn, Inc. v. Wilson, 343 U.S. 495; Heller v. New York, 413 U.S. 483; Organization for a Better Austin v. Keefe, 402 U.S. 415; Bantam Books, Inc. v. Sullivan, 372 U.S. 58.

Where a State wishes to regulate speech in any form such regulation must be highly precise, for "a state is not free to adopt whichever procedures it pleases for dealing with obscenity ... without regard to the possible consequences for constitutionally protected speech." Marcus v. Search Warrant, 367 U.S. 717, 731. See Speiser v. Randall, 357 U.S. 513; Shelton v. Tucker, 364 U.S. 479. This Court has also said that "our insistence that regulations of obscenity scrupulously embody the most vigorous procedural safeguard ... is ... but a

special instance of the larger principle and the freedoms of expression must be ringed about with adequate bulwarks ...." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963). See Blount v. Rizzi, 400 U.S. 410, 416-17 (1971).

The Ohio nuisance statutes O.R.C. §3767.04 and §3767.06, on their face, and as construed by the Ohio Supreme Court grossly violate the First Amendment to the United States Constitution. They inhibit the dissemination and expression of all speech, based upon one past activity, they force persons to become self-censors and they unconstitutionally shift the burden of the proof of obscenity from the State to the individual. Instead of using the less drastic means of regulating speech as recommended in Shelton v. Tucker, supra, for Ohio does have criminal obscenity laws which they have not

used here, the State has chosen to civilly punish and censor the individuals here.

> For whatever wrong the appellant has committed or may commit, by his publications, the State appropriately affords both public and private redress by its libel laws. As has been noted, the statute in question does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction, that is, for restraint upon publication.

Near v. Minnesota, 283 U.S. at 715 (emphasis added).

Finally, contrary to Appellant's argument, the issue does not concern what the Appellee has done in the past, or the fact that a particular film shown is deemed after a proper judicial hearing to be obscene, but whether or not because of such an activity they can be restrained in the future from exhibiting films which are presumptively protected by the First

Amendment to the United States Constitution. The Court in Near, supra, was not concerned with the validity of the charges against the newspaper, nor should the Court herein be similarly concerned by the validity of the obscenity allegations herein.

> We should add that this decision rests upon the operation and effect of the statute, without regard to the question of truth of the charges contained in a particular periodical. The fact that the public officers named in this case, and those associated with the charges of official dereliction, may be deemed to be impeccable, cannot affect the conclusion that the statute imposes an unconstitutional restraint upon publication.

283 U.S. at 723 (emphasis added).

CONCLUSION

The three judge district court was properly convened and properly took

jurisdiction of the civil rights action. Younger v. Harris, supra, and Samuels v. Mackell, supra, have no application where the case in question is civil in nature and is "not pending" at the time the suit is brought. Also, the Ohio Nuisance Abatement Statutes, O.R.C. §3767.04 and §3767.06, are unconstitutional on their faces and as applied because they are an impermissible prior restraint on free speech and press.

This Court should affirm the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have served the following people with a copy of the foregoing Brief by depositing same in the United States Mail in properly addressed envelopes with sufficient postage affixed thereto to insure delivery.

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